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No. 87-537

IN THE SUPREME COURT

OF THE

UNITED STATES

JAMES JOSEPH DARNELL,
Petitioner,

vs.

VINCENT SWINNEY, WASHOE COUNTY SHERIFF,
and
BRIAN W. McKAY, NEVADA ATTORNEY GENERAL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Pursuant to SCR 34.2, the Respondents respectfully suggest review by way of Certiorari is not justified in this case. However, should the Writ of Certiorari be granted, the issues which would be presented are as follows:

A. WAS THE NEVADA SUPREME COURT'S INTERPRETATION OF NEVADA'S EXISTING CRIMINAL ATTEMPT STATUTE FORESEEABLE AND DEFENSIBLE BY REFERENCE TO THE LAW WHICH HAD BEEN EXPRESSED PRIOR TO DARNELL'S PURCHASE OF RECOVERED STOLEN FIREARMS?

B. DID THE INSTRUCTIONS TO THE JURY, REVIEWED AS A WHOLE, FULLY AND FAIRLY EXPLAIN THE APPLICABLE LAW ON CRIMINAL ATTEMPT AND POSSESSION OF STOLEN PROPERTY?

C. IS NEVADA'S STATUTORILY MANDATED JURY INSTRUCTION DEFINING REASONABLE DOUBT CONSTITUTIONALLY DEFECTIVE SO AS TO WARRANT OVERTURNING DARNELL'S CONVICTION?

D. DID THE LOWER COURTS ERR IN DETERMINING THAT DARNELL SHOWED NEITHER INTERFERENCE WITH HIS INVESTIGATION, NOR ANY PREJUDICE FLOWING THEREFROM, AND ERROR WHICH WOULD WARRANT OVERTURNING HIS CONVICTION?

E. DID THE LOWER COURTS COMMIT CONSTITUTIONAL ERROR OF SUCH MAGNITUDE AS TO WARRANT OVERTURNING DARNELL'S CONVICTION IN HOLDING THAT EVIDENCE OF DARNELL'S OTHER PURCHASES OF STOLEN FIREARMS FROM THE SAME BURGLAR WAS ADMISSIBLE TO SHOW HIS INTENT AT THE TIME HE PURCHASED THE RECOVERED FIREARMS?

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STATEMENT OF THE CASE

The transcript of the trial in this case is comprised of eight volumes - 2,619 pages. They have been available to the state courts in their review, as well as to the Federal District Court for the State of Nevada and the Ninth Circuit Court of

Appeals of the United States. This statement of the case is taken from the testimony given at that trial. It is presented pursuant to SCR 34.2 and 22.1.

In October, 1974, officers of the Sparks Police Department arrested James Joseph Latour in connection with a burglary investigation. Sparks is a separate municipality which borders the City of Reno. Some 5 days after Latour's initial arrest, two detectives, one each from the Reno and Sparks Police Departments, questioned Latour about his involvement in local burglaries. Latour told Detective Gordon Jenkins of the Sparks Police Department that he and two other people had recently opened a camper by force, which camper was parked near the Reno Airport in the City of Reno, and had taken two shotguns and a .22 caliber pistol from the camper. Detectives Martin and and Jenkins recovered those weapons from Latour's apartment.

At the end of the interview, Detective Jenkins asked Latour if he had any other information that he wished to provide. Latour replied, "yes, but I'm not certain you want to hear it." After further questioning, Latour related details of an incident in which he, along with other persons, sold a K-38 revolver to James Darnell, a Reno Police Officer at the time - the Petitioner herein.

Latour's information prompted a joint investigative effort on behalf of Reno and Sparks Police Departments and the Washoe County District Attorney's Office (both the cities of Reno and Sparks are within Washoe County).

As part of the investigation, the police arranged for Latour to offer to sell to Petitioner Darnell the guns which had been recovered from the theft involving the camper near the Reno Airport.

On the evening of October 9, 1974,

Latour brought his vehicle to the Sparks Police Department. Detectives placed the listening device on Latour's person and put the recovered weapons - two shotguns and automatic pistol - in Latour's vehicle. Latour then drove his vehicle to the El Tavern, a restaurant on the western edge of Reno. After his arrival at the El Tavern, Latour called the Reno Police Department dispatcher from a telephone booth and was told that Darnell was on a food break at the Eldorado Hotel-Casino. Latour then called the Eldorado Hotel-Casino, had Darnell paged, and spoke to Darnell on the telephone. At that time, Latour told Darnell that he had "...some things to sell." Darnell responded that he would meet Latour in 15 to 20 minutes at the El Tavern.

Darnell, at that time working a shift as a patrol officer in the City of Reno, left the Eldorado Hotel-Casino, drove his police

vehicle to the El Tavern, and met with Latour inside the restaurant. At no time did Darnell report to the Reno Police dispatcher that he was leaving the Eldorado Hotel-Casino, or that he was ending his break.

After a short discussion, Darnell and Latour left the El Tavern and drove their vehicles a short distance across the street to a place where Latour, at Darnell's instruction, laid the firearms on the hood of Darnell's patrol car. Latour specifically told Darnell that the guns were stolen. The two agreed upon a price for the guns, and Darnell stated that he would pay Latour the next day. Latour, as well as two of the three officers who conducted the surveillance of the transaction, testified that Darnell threatened to kill Latour if the transaction was ever revealed to law enforcement authorities.

Darnell then loaded the guns he had

purchased from Latour into his patrol car and left the area. After obtaining the weapons, and while en route to the Reno Police Station, he radioed the dispatcher and inquired as to whether his commander was in the station at the time.

Officers who were positioned on the roof of the police station watched Darnell upon his arrival. Darnell double-parked his patrol vehicle in the vicinity of a private automobile which belonged to Officer Gerald Hazen; Hazen was to give Darnell a ride home from work. Another unidentified vehicle approached and Darnell drove away from Hazen's vehicle. He drove his patrol car to the gate area of the police department's fenced parking area where he parked the vehicle. Darnell then removed three guns from the patrol car, carried them to Hazen's vehicle, and placed the guns on the floor in the back seat, then locking Hazen's car.

At no time during his radio transmissions prior to his return to the station did Darnell refer to his meeting with Latour or to the guns he had in his possession.

After he had put the guns in Officer Hazen's private vehicle, Darnell then drove his patrol car from the gate area to the general servicing area for police vehicles, and waited for someone to put gas in his patrol car. He parked the patrol car and walked into the police station. Darnell later came out of the police station, retrieved the guns from Hazen's car, and moved them to the office of Reno Police Detective James Westlake.

The prosecution argued at the trial that Darnell had been alerted to the possibility that Latour was working with the police. The evidence showed that there was a phone call made to the patrol division office while Darnell was in talking to the shift

commander. The caller was Latour.

Following the transfer of the guns to Darnell, Latour had returned to the Sparks Police Station. Because he was unable to locate any of the officers he had been working with in arranging the "sale" of the guns, Latour panicked, phoning the Reno Police Department in an attempt to contact the Reno Chief of Police, James Parker. Latour's call was transferred to the Patrol Division Office. Richard Thomsen, the shift commander, took the call; he was unaware of the details of the surveillance operation involving Darnell. Latour asked Thomsen if could speak to Chief Parker. Thomsen, in Darnell's presence, told the as yet unidentified caller, Latour, that Chief Parker was not present, but that Captain Pulver had just entered the office. Latour told Thomsen to ask Captain Pulver if he knew Joe Latour; Thomsen asked this question in Darnell's presence. Before Pulver

could answer, Darnell stated that he thought the call was for him and picked up the phone. Captain Pulver, who was aware of the surveillance operation, asked Thomsen to step into his adjoining office. Thomsen was able to monitor how long Darnell was on the phone by watching the lights on the extension phone in Captain Pulver's office. When the light went out, Thomsen left Pulver's office; Darnell had left.

On the phone, Darnell asked Latour why he was calling the Reno Police Department; Latour stated that he had been arrested for speeding in the City of Sparks. Darnell questioned Latour as to why a Sparks traffic arrest would prompt a call to the Reno Police Department.

Darnell went to the office of James Westlake, asking for a burglary detective. After being told that no one was available, Darnell told Westlake that he

"had met a kid who had offered to sell him some stolen guns for a hundred dollars." Darnell told Westlake he had taken the guns and told the kid he would pay for the guns the next day.

Westlake told Darnell to bring the guns into the police station; Darnell left for a minute, came back, and asked Westlake if he knew "a Jenkins who worked for the Sparks Police Department." Westlake's affirmative reply drew a request for the telephone number of the Sparks Police Department.

Darnell called the Sparks Police Department, leaving a message for Sparks Detective Jenkins with a clerk of the Sparks Police Department, stating that "a kid had left some stuff...that had been taken in a Sparks burglary and that he wanted to release to Sergeant Jenkins, rather than go through the process of booking it in Reno then releasing it to Sparks."

As has been pointed out above, the guns

had actually been taken in a Reno burglary from a camper near the Reno Airport.

Darnell had learned of Jenkins' name earlier, when he had talked to Latour.

Darnell left Westlake's office following the call to Sparks, and returned a few minutes later with the guns. Westlake spotted the guns, and stated to Darnell that the guns had been taken out of a captain's safe earlier that evening. Darnell said he wanted to take the guns to Lieutenant Thomsen's office, Westlake told him to leave the guns where they were. At 9:52 p.m., Westlake made a phone call to attempt to find Detective Penegor. Detective Westlake made that call because Darnell had the guns in his office at the time. Immediately after the call, Captain McKillip, Chief Parker, and Sergeant Jenkins entered Westlake's Office and shortly thereafter placed Darnell under arrest.

Both Lieutenant Thomsen and Captain Pulver stated that the Latour call came in at 9:50 p.m. During the time he was in the patrol office with them, Darnell did not tell either of them of his meeting with Latour or of the guns he had obtained.

Darnell's defense at the trial was that he had in fact obtained the guns from Latour, but did so with the intent of arresting Latour and turning the guns in as evidence. The State contended that he had obtained the guns from Latour with criminal intent.

To show his intent, the State presented evidence of Darnell's earlier purchase of a K-38 pistol from Latour - a weapon which Darnell never turned in as evidence.

Darnell's claim at trial was that he was not tipped off by Latour, and he attempted to prove that he had already brought the guns into the station prior to Latour's call in support of his contention.

Darnell had, prior to trial, successfully challenged one count of possession of stolen property; because the property - the guns - had been recovered by police prior to Darnell's having obtained possession of them, the guns had lost their stolen character under Nevada State law, and thus a charge of possession of stolen property would not lie. Darnell was found guilty of attempted possession of stolen property by the jury at his trial. He was subsequently sentenced to a suspended four year term in the Nevada State Prison, placed on a term of probation of four years, and ordered to serve six months in the Washoe County Jail as a term of probation. It must be noted that the sentence imposed upon Darnell by the state court has been stayed since the initiation of his original appeal in the state system; with the exception of pre-trial incarceration, for which credit has been given against the sentence, no portion

of the sentence has yet been served.

Darnell appealed his conviction for the attempted possession of stolen property, and the Nevada State Supreme Court affirmed that conviction and sentence on his direct appeal. **Darnell v. State**, 559 P.2d 624 (1976); Petitioner's Appendix B.

Darnell had contended on his appeal that legal impossibility precluded conviction of an attempt to commit a crime, as well as claiming that the evidence of his other bad act was improper. Both contentions were denied.

Upon the denial of his direct appeal in the Nevada Supreme Court, Darnell then petitioned the Nevada State Supreme Court for rehearing, raising for the first time his claim that the decision on the "legal impossibility" issue was unexpected extension of Nevada criminal law, constituting a violation of the **ex post facto** provisions of the United States Constitution. The

rehearing was denied by the Nevada State Supreme Court on the basis that the issue had not been before the court on direct appeal, and could not be raised for the first time in a request for rehearing.

Darnell took his claims to the federal courts. On February 1, 1977, he filed a petition for federal habeas corpus relief in the United States District Court for the District of Nevada under Case No. CV-R-77-19-BRT styled **Darnell v. Galli.** The Federal District Court for the State of Nevada determined that the issue of **ex post facto** criminalization had not been exhausted in the Nevada state courts, and had the file transmitted to the Nevada State Supreme Court to be treated there as as an original petition for state habeas corpus relief. The Nevada State Supreme Court considered the **ex post facto** claim in that context, holding that a decision on a direct appeal did not result in **ex post**

facto criminality, stating specifically that the language Darnell relied upon in his claim was **obiter dicta.**

Darnell again raised his claims in the federal courts; he modified his attack to include the claim that the general common law would not support his conviction, and thus, the decision of the Nevada Supreme Court still constituted an **ex post facto** criminalization of his conduct. The United States District Court for the District of Nevada held that this strategy on Darnell's part was fatal to his petition, as the "common law" issue had not been exhausted in the state courts in Nevada.

Darnell then appealed the denial of his petition to the United States Court of Appeals to the Ninth Circuit, which ruled against him on the exhaustion question in an unpublished memorandum filed June 18, 1979. **Darnell v. Galli**, Case No. 78-1955 (Ninth Circuit 1979).

Darnell then pursued state habeas corpus proceedings regarding his "common law" claims and was unsuccessful. He appealed from the denial of his state habeas corpus proceeding to the Nevada State Supreme Court. The Court upheld the denial of habeas corpus relief on the state procedural prohibition against piecemeal habeas corpus attacks, noting that the issue of "common law precedent" had been brought to the attention of Darnell through the tortured process the case had already taken through the state and federal systems, and that he had failed to show any good cause for failure to raise the issue in his previous petition for habeas corpus before the Nevada State Supreme Court. **Darnell v. State**, 964 P.2d 1009 (1982); Petitioner's Appendix C.

Darnell once again turned to the federal system with his claims, finally exhausted the state courts of Nevada. The instant

case was filed as a petition for habeas corpus relief on March 3, 1983. Briefs, as well as an Appendix of relevant portions of the record, were provided the federal magistrate, who entered a report and recommendation addressing all of Darnell's claims, and recommending denial of the relief requested. Darnell objected to the report and recommendation; the United States District Court for the District of Nevada entered a Memorandum Decision and Order denying relief on all the alleged grounds raised by Darnell's petition. (Petitioner's Appendix D). Darnell appealed to the United States Court of Appeals for the Ninth Circuit, which denied his appeal. (Petitioner's Appendix E). From the denial of his appeal, Darnell has petitioned this Court for a Writ of Certiorari. It is the Respondent's position that a Writ of Certiorari is not warranted in this case.

REASONS FOR DENYING THE WRIT

A. Darnell's Conduct Was Criminal At The Time He Gained The Possession Of The Firearms; The Nevada State Supreme Court Interpretation Of Nevada's Criminal Attempt Law Was Foreseeable And Defensible, Hence There Is No Federal Question Due To The Claimed Ex Post Facto Criminalization Of Darnell's Conduct.

The Ex Post Facto Clause of the United States Constitution, Article 1, Section 10, does not, of its own force, govern judicial pronouncements of law. **Marks v. United States**, 430 U.S. 188, 191 (1977). This Court has ruled that the concept of "fair warning" - the core of the **ex post facto** analysis - prohibits retroactive application of judicial decisions when "a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue ..." **Bouie v. City of Columbia**, 378 U.S. 347, 354 (1964) (emphasis supplied).

The analysis this Court has applied

recognizes both the need for "fair warning" that one's conduct will be deemed criminal and the fact that "...all case law, including that interpreting criminal statutes, operates retroactively, and such retroactivity is an essential part of our legal system." **LaFave, Criminal Law** 94 (1972). The due process clause is not violated in a case such as this when a state court decides a question of first impression in that jurisdiction concerning the meaning and scope of a state statute. **United States v. Rundle**, 255 F.Supp. 936 (E.D. Penn. 1966), affirmed 383 F.2d 421 (3rd Cir. 1967). See also **Chavez v. Dickson**, 280 F.2d 727 (9th Cir. 1960). In **Rundle**, the district court directly addressed the issue of why this concept of "fair warning" is applied through the due process clause, in a fashion analogous to the Ex Post Facto Clause which applies only to legislatures:

> "Throughout the development of the common law courts fashioned new rules of law to meet situations for which a previous rule had not been developed. The relator does not deny that this is true, however, he contends that these rules must be prospective in their effect.... In the judgment of this Court, whether or not a rule may be applied to a defendant in a criminal case depends on whether it may fairly be said that the enunciation of the rule caught the defendant so completely unaware that he had no warning that his conduct was criminal." **United States v. Rundle**, 255 F.Supp. 936, 946 (E.D. Penn. 1966), affirmed 383 F.2d 421 (3rd Cir. 1967).

The sole issue presented by Darnell in his defense was what his intent had been at the time he received the weapons from Latour. The jury believed it to be criminal. Inferences that Darnell was aware his conduct was criminal may be drawn from the fact that he threatened Latour with death if the sale were ever revealed; he failed to advise radio dispatch, per police procedure, of his

change in location to go meet with Latour. Darnell had approached Officer Hazen's private vehicle in his police car, but moved when another car approached - an indication that he wanted to keep his behavior secret. He then parked his police cruiser short of the normal parking area, and carried the guns back to Hazen's car where he concealed them in the back seat. Not until he had done all this did he then enter the police compound with his police cruiser, and only then enter the police station.

At the time Darnell got the guns from Latour, even under his own interpretation of the facts, he admits that he thought the guns were in fact stolen.

The interpretation that Darnell has chosen to place upon **State v. Lung**, 21 Nev. 209, 28 P. 235 (1891) was specifically rejected by the Nevada Supreme Court when he brought it up for

review. Darnell's claim is that this decision of a question of first impression cannot be applied to his case. Nevada's Supreme Court has determined that the language Darnell has been quoting from **Lung** was **obiter dicta.** A review of that case shows that Lung's challenge to his indictment for attempted sexual assault was successful, in that there had been no showing he ever intended to have intercourse without consent; All that Mr. Lung was alleged to have done was to have placed cantharides (Spanish fly) in a woman's coffee. There was a failure to aver any illegal intent, so the indictment was dismissed. **State v. Lung,** 21 Nev. 209, 215-217, 28 P. 235, 237-238 (1891).

In its decision to reject the "legal impossibility" defense in a case such as this, and its interpretation of the language from Lung as **obiter dicta,** the

Nevada Supreme Court was interpreting state law and the meaning of its prior decisions. That interpretation of state law was binding on the court below, and hence its ruling was correct. See **Wainwright v. Goode**, 464 U.S. 78, 84 (1983) (per curium). Since habeas corpus relief is generally unavailable for federal relief from the interpretation or application of state law, the only issues left for the court below were whether the common law had an established precedent which rendered the 1976 Nevada Supreme Court decision a violation of Darnell's constitutional rights to due process - because of notice. See **Engle v. Isaac**, 456 U.S. 107, 119 (1982).

The Petitioner, throughout his arguments, presupposes that the common law conclusively recognized that legal impossibility was a defense to a criminal attempt charge at the time he received

the guns from Latour. There was clearly ample case law rejecting the legal impossibility defense, and the Nevada Supreme Court relied upon such common law authority in reaching its decision in 1976. A review of that law shows that the results reached by the Nevada Supreme Court was neither unforeseeable nor indefensible. See **People v. Rojas**, 358 P.2d 921 (Ca. 1961). **R. v. Brown**, 24 Qbd 357 (1889); **R. v. Ring**, 17 Cox C. C. 491, 66 L.T. (N.S.) 306 (1892); **Ex Parte Magidson**, 32 Cal.App. 566, 163 Pac. 689 (1917); **People v. Jaffe**, 195 N.Y. 497, 78 N.E. 1113 (1906). As such, there is no federal question presented by the petition regarding the "ex post facto" issue, in that Darnell had fair warning that his conduct was in fact criminal at the time he committed it. The Nevada Supreme Court's decision as to how an "attempt" would be interpreted regarding

a legal impossibility defense was not unforeseeable nor indefensible, and thus no federal issue is genuinely raised under the facts of this case.

B. The Decisions Of The Courts Below, Regarding The Sufficiency Of The Jury Instructions Given In This Case Are Not In Conflict With Controlling Decisions Of This Court.

The Respondents concede that a trial jury must be instructed as to each and every element of a charged offense and that the State must prove those elements beyond a reasonable doubt; the lower courts determined that in fact each and every element was described when the instructions were reviewed as a whole. The elements of the crime were adequately set forth in Instruction 17, which defined possession of stolen property, Instruction 18, which defined an attempt, Instruction 14, which required proof beyond a reasonable doubt, Instruction 15, which describes the necessary union

of act and intent for criminal purposes, and Instruction 23, which specifically provided for an acquittal if the jury believed Darnell's claim that he had no criminal intent at the time he obtained the weapons.

Although the United States Court of Appeals for the Ninth Circuit felt the instructions were not as clear as that court would like, it held that any deficiencies in the instructions went into matters that were not in dispute and that the instructions on the disputed issue of intent, the instructions were sufficiently clear. As such, the decision of the Ninth Circuit that the jury instructions did not so affect the entire trial that the resulting conviction violates due process, was not a decision which runs afoul of any of this Court's holdings. The writ should be denied.

C. Nevada's Statutory Instruction On Reasonable Doubt Does Not Improperly Dilute The Prosecution's Burden In A Criminal Case.

In re Winship, 397 U.S. 358, 364 (1970) requires that a defendant be proven guilty by no lesser standard than "beyond a reasonable doubt." A review of Nevada's statutory definition of reasonable doubt shows that the instruction does not dilute the prosecution's burden, in that the challenged phrase "actual and substantial" is used as a contrast to doubt - based upon "mere possibility or speculation." As the court below noted, the use of the term "substantial" has not, standing alone, provided a basis for federal habeas corpus relief; the Ninth Circuit has previously construed a similar jury instruction not to violate constitutional principles. Petitioner's Appendix at p. 29.

The ruling of the Ninth Circuit Court of Appeals that the definition does not violate constitutional principles is not in conflict with any of the decisions of this Court. Certiorari should not be granted to attack the reasonable doubt instruction, as it is not improper, and did not so infect the trial as to render the conviction of violation of due process.

D. Petitioner's Remaining Question Of Error Do Not Breach Constitutional Proportions.

The lower courts have uniformly determined that evidence of Darnell's prior purchase of a stolen firearm from Latour was relevant to show Darnell's intent when he purchased the remaining weapons. Since intent is something which is rarely capable of objective proof, but must be inferred from the actions and behavior of an individual, Darnell's prior conduct was peculiarly probative in

this case. His prior purchase was approximately a year before the instant one; Darnell never reported that prior sale. The evidence was found to be factually similar enough to be probative of his intent on the instant occasion, when he claimed to be acting solely as a police officer in the course of his duties. Even were the rulings of all the courts below in error, the admission of that evidence did not render the trial so fundamentally unfair as to invoke constitutional protections under the due process clause.

Darnell failed to prove that there was any interference with his counsel's ability to interview witnesses is not one which warrants review on certiorari. (See Ninth Circuit Opinion at Petitioner's Appendix, p. 30). Even were any improper instructions given, Darnell has never proven in the courts below that

he was prejudiced in any fashion by such conduct.

Of the 29 witnesses who testified in the prosecution's case, only six were even questioned about their alleged inaccessibility. Their responses to such questions do not help Darnell.

Latour indicated that he had refused a lunch invitation by Darnell after the trial had commenced; in light of Darnell's previous death threats the refusal appeared to be based solely on personal choice. Detective Westlake in fact discussed the case at length with defense counsel; Officer Hazen was never contacted at all by defense counsel prior to trial. Janice Morrison was not contacted by defense counsel until the morning she was scheduled to testify; she refused to speak with him out of personal choice, had been advised that she was not required to speak with defense counsel,

and had never been advised not to speak with him. Police Sergeant Kirkland discussed the case with defense counsel prior to trial, only refusing to answer when he could not specifically recall details. Reno Police Chief Parker refused to answer questions because he did not wish to answer them. Reviewed as a whole, the witnesses cooperated with the defense as much as they were required to, if they had been contacted at all. The claimed interference had not been proven, no prejudice had been shown.

None of the assertions of Petitioner raise this unique factual scenario to one which includes constitutional protections which must be addressed by the United States Supreme Court. As such, the writ should be denied.

CONCLUSION

The Petitioner has pointed to no situation where the state courts in Nevada decided federal questions in ways which are in conflict with the decisions of the federal courts, nor any important questions of federal law which have not been settled by this Court. The case, itself, turn primarily on the peculiar facts of the situation, ones which are not likely to recur in such a fashion as would render this case a good vehicle for review. Darnell's **ex post facto** claims, because of the unique facts which give rise to them, are unlikely to recur.

The proper result having been reached by the courts below, review by certiorari should be denied.

Dated: January 11, 1988.

Respectfully submitted,

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